

FILED

APR 15 2022

Mark A. Clearman
Name
95638-012
Prison Number
U.S. Penitentiary Atwater
P.O. Box 019001
Atwater CA 95301
Address or Place of Confinement
APR 15 2022
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY [Signature] DEPUTY CLERK

Note: If represented by an attorney, write attorney's name, address & telephone number

United States District Court
EASTERN DISTRICT OF CALIFORNIA

MARK ANTHONY CLEARMAN
Full Name (First, Middle, Last)

CASE NO. 1:22CV000444HBK HC
(to be supplied by the Clerk of the
United States District Court)

vs. Petitioner,

B. M. TRATE
Name of Warden
(or other authorized person having custody of petitioner)

Respondent.

PETITION FOR
WRIT OF HABEAS CORPUS
PURSUANT TO 28 U.S.C. § 2241
BY A PERSON IN FEDERAL CUSTODY

PLEASE COMPLETE THE FOLLOWING (check the appropriate number):

This petition concerns:

1. a conviction
2. ✓ a sentence
3. jail or prison conditions
4. prison discipline
5. a parole problem
6. other

CAUTION: If you are attacking a federal conviction, sentence or judgment, you must first file a direct appeal or motion under 28 U.S.C. § 2255 in the federal court which entered judgment.

PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2241 BY A PERSON IN FEDERAL CUSTODY

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PETITION

- (1) Place of detention: U.S.P Atwater, 1 Federal Way Atwater CA 95301
- (2) Name and location of court which imposed sentence: Eight District Court - 400
East 9th Street, 5510 Kansas City mo 64106
- (3) Offense(s) and indictment number(s) (if known) for the sentence imposed:
91-00089-03-CR-W-6-1
- (4) The date the sentence was imposed and the terms of the sentence:
August 20, 1992
Life without possibility of parole
- (5) What was your plea (check one): Not guilty (✓) Guilty () Nolo contendere ()
- (6) Kind of trial (check one): Jury (✓) Judge only ()
- (7) Did you appeal from the judgment of conviction or the imposition of sentence: Yes (✓) No ()
- (8) If you did appeal, answer the following for each appeal:

FIRST APPEAL: 3 F.3d 244 1993 U.S. v MABRY

Name of court: Eighth Circuit, Court of Appeals (direct-Appeal)

Grounds raised (list each):

- 1) Clearman entitled to mistrial or severance
- 2) Two prior drug felonies, not proven by government

Result/Date of result: Denied August 13 1993

SECOND APPEAL:

Name of court: Eighth District Court (28 U.S.C 2255)

Grounds raised (list each):

- 1) Ineffective Assistance of Counsel
- 2) Prosecutorial Misconduct

Result/Date of result: denied April 8th 1998

GROUND FOR THIS 28 U.S.C. § 2241 PETITION

- (9) State *CONCISELY* every ground on which you claim that your sentence is being executed in an illegal manner. Summarize *briefly* the facts supporting each ground

CAUTION: If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2241 BY A PERSON IN FEDERAL CUSTODY

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→ GROUND ONE I am actually and factually innocent

of a prior Cal. State drug felony actuating a mandatory minimum life sentence.

Supporting FACTS for GROUND ONE (tell your story BRIEFLY without citing cases or law).

CAUTION: You must state facts, not conclusions, in support of your grounds. A rule of thumb to follow is -- who did exactly what to violate your rights at what time or place.

neither at the time of my sentencing in 1992 nor my direct appeal in 1993, had the Eighth Circuit yet adopted that the Ninth Circuit District Courts had a criterion used to reduce some offenses known as "WOBBLEERS" from a felony offense to a misdemeanor, as in my case verified in the sentencing transcript for prior.

→ GROUND TWO I have not had an "Unobstructed Procedural Shot" to present the above claim under 2244 successive-2255

Supporting FACTS for GROUND TWO (tell your story BRIEFLY without citing cases or law).

After presenting my 2255 in 1998 on different grounds, the Eighth Circuit changed their precedent in qualifying prior California State convictions for enhancement of sentence purpose under California WOBBLER status. The Eighth Circuit has now had cases from 2004 up to 2019. yet I cant meet the criterion under 2244 second/successive

ADMINISTRATIVE APPEALS

- (10) Have you presented the claims raised in Question #9 of this petition to prison officials in a prison administrations appeal?

Yes () No (✓) If your answer is no, explain why not: relief not available through BOP Appeals

If your answer is yes, answer the following for each administrative appeal:

FIRST ADMINISTRATIVE APPEAL

Level of appeal: _____

Grounds raised (list each):

1) _____

2) _____

Result/Date of result: _____

SECOND ADMINISTRATIVE APPEAL

Level of appeal: _____

Grounds raised (list each):

1) _____

2) _____

Result/Date of result: _____

THIRD ADMINISTRATIVE APPEAL

Level of appeal: _____

Grounds raised (list each):

- 1) _____
- 2) _____

Result/Date of result: _____

FOURTH ADMINISTRATIVE APPEAL Level of appeal: _____

Grounds raised (list each):

- 1) _____
- 2) _____

Result/Date of result: _____

- (11) Is the grievance process completed? Yes () No ()

PREVIOUS PETITIONS

- (12) Have you filed previous petitions for habeas corpus under 28 U.S.C. § 2241 or 28 U.S.C. § 2255, or any other applications, petitions or motions with respect to the claims raised in Question #9 of this petition?

Yes (✓) No ()

- (13) If your answer to Question #12 was yes, give the following information for *each* previous petition:

FIRST PREVIOUS PETITION

Name of court: Eighth District Court (2255)

Nature of proceeding: 2255 motion for relief

Grounds raised (list each):

- 1) Ineffective Assistance of Counsel
- 2) Prosecutorial Misconduct

Result/Date of result: denied - April 8th 1998

SECOND PREVIOUS PETITION

Name of court: United States District Court - 9th District

Nature of proceeding: seeking reduction in sentence

Grounds raised (list each):

- 1) one of two prior state convictions is an invalid enhancement
- 2) ment

Result/Date of result: 15 years ago "the only in, was actually innocent of the offence under 2241 - Transferred 2007"

- (14) If the claims raised in Question #9 of this petition concern your conviction or sentence, explain why you are filing your petition pursuant to § 2241 instead of § 2255.

28 U.S.C. 2255 is "inadequate or ineffective" to test the claim of actual innocence of the predicated offence used for enhancement to mandatory life sentence. 9th Circuit precedence now available to challenge improper predicate offence triggering mandatory minimum sentence as carrier offender

- (15) Are you presently represented by counsel?

Yes ()

No (✓)

If so, provide your attorney's name, address, and telephone number:

- (16) If you are seeking leave to proceed *in forma pauperis*, have you completed the application setting forth the required information?

Yes ()

No (✓)

Note: If your answer is no, you must send a \$5.00 filing fee to the court with your petition.

WHEREFORE, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

4 - 12 - 2022
(Date)

Mark Anthony Clearman
(Signature of Petitioner)

(Signature of Attorney, if any)

Mark Anthony Clearman 9538-012: (Attachment BRIEF) 21 U.S.C. § 2241 Form Motion.

[POST CONVICTION HISTORY]

Mark A. Clearman, here and after movant, was arrested at his residence on April 18th 1991 at age 35 in Los Angeles California. After waiving an extradition hearing later transported to Kansas City Missouri where movant was charged with 3 native citizens of Kansas. After a trial by jury movant was found guilty of 1-count in the third superseded 30 count indictment, that being 21 U.S.C. 841 (b) (1). The evidence at trial depicts movant as a 4-month participant in the 7 year duration of the offence. Movant received a mandatory minimum life sentence based on 2-prior California State convictions used as sentencing enhancements under §851.

[JURISDICTION]

Courts jurisdiction to consider a §2241 motion is authorized under Michael Allen v. Richard Ives, 950 F.3d 1184 2020, U.S. Lexis 5652, No. 18-35001 February 24, 2020.. The Allen-Ives Court decided the Courts jurisdiction is accessible for using §2241 when a claim of actual innocence is presented satisfying 28 U.S.C. 2255(e) - Escape Hatch, whereas 28 § U.S.C. 2255 is inadequate or ineffective to test the legalities of petitioners detention.

Additional propriety supporting the use of § 2241 can also be found in "Shephard v. Unknown Party, Warden FCI Tucson 5. F.4th 1075 (9th Cir. 2021) A petitioner claiming actual innocence of a non-capital sentence for which no "Unimpeded

Shot" previously existed applies to petitioners who received a mandatory sentencing scheme" Id. at 1077, Quoting - Allen v Ives 976 F.3d 863, 846 (9th Cir. 2020)

Like Allen, the precedence for movants claim became available after the his Direct Appeal in 1993, and also his § 2255 motion in 1998. There has never been an "obstructed procedural shot" to a hearing, because the claims arose after both the direct appeal and §2255, The several failed attempts at redress were all dismissed for not adhering to rules for filing a second or successive 2255, under 28 U.S.C.S 2244. (1) newly discovered evidence or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the U.S. Supreme Court, that was previously unavailable. §2255(h)

[ACTUAL INNOCENCE]

Movant like Allen-Ives, asserts that he is actually and factually innocent of a prior predicated offence that mandated a mandatory minimum life sentence as a career offender.

The prior Cal.State offence in question was rendered to be a misdemeanor by California, Superior Court Judge, Bonnie Lee Martin, Dept.no 112. On May 7 1981 during hearing No. A 356276 Probation] through an agreement with the State Prosecutor Mr.Sweeters, Defenses Counsel C.Burkow, and Clearman, - "that movant be sentenced to 90 days LA County jail with probation. In place of State Prison. The sentence was served in LA County's Way Side Honor Rancho Facility. and probation completed successfully.

{Transcript Exhibit } p.2 L.8 to 14

The district attorney and the court, as well as the defendant and his attorney, agree that the defendant would be sentenced to no more than 90 days in County Jail; that he would be placed on felony probation.

The court has requested, received and considered a 15-page probation officers report which does recommend felony probation with County Jail time;

In Accord with Cal.Penal Code §17(b)(1) the imposed sentence of 90 days County Jail and probation rendered the offence 11350(a) to be a misdemeanor".

{Cal.P.Code §17(b)(1)}

17(b) When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances;

**17(b)(1) After a judgement imposing a punishment other than imprisonment in the state prison.

Movants prior California State conviction in question from 1981, Cal.Health & Safety code 11350(a), was known as a Wobbler" an offence that can be adjudicated as a felony or misdemeanor, thought to Wobble between felony or misdemeanor offence until final judgement is entered. Whether a Wobbler is determined to be a misdemeanor or felony is controlled by Cal.Penal Code §17(b), which sets out the range of judgments by which an offence is categorized "for all purposes"

subsequent to judgment. Cal.Penal Code §17(b) see also United States v. Robinson 967 F.2d 287, 293 (9th Cir.1992)

Additionally the Prior California State Offence in question Cal.P.Code 11350(a) is no longer a Wobbler.. It is now classified as strictly a "misdemeanor" Under California's Proposition 47 mandated into law 1915. See Exhibit.

[UNOBSTRUCTED PROCEDURAL SHOT]

Clearman has never had an Unobstructed Procedural Shot at presenting this claim. The supporting precedence in the district of conviction (8th District) became available after movants Direct Appeal in 1993, and after movants §2255 in 1998...

9th Circuit Precedence in California is not binding on the 8th Circuit in Missouri, and the same is true vice versa. On some issues of law several Circuits have "ADOPTED" rulings from other districts to apply in their district, emphasis added, these circumstance are present here.. When movant was convicted in the 8th District in 1991, the standard used to qualify the prior conviction as sentencing enhancement was- "If the conviction carried a sentence of a year or more, regardless of a lesser sentence received, it was suitable for sentencing enhancement.

"Although "9 years after the direct appeal", and 4 years after the §2255 the 8th District "acknowledges and adopts" the 9th Districts laws under which California Courts have authority to sentence some offences known as "Wobblers" as either a felony or misdemeanor. The sentencing transcript from

the probation hearing reflects that Superior Court Judge Bonnie Lee Martin reduced the offence to a misdemeanor, under Cal.Penal.Code §17(b(1), thereafter the prior state conviction does not qualify for sentencing enhancement purposes.

Movants direct appeal was denied in 1993 and the §2255 motion was denied in 1998. Four (4) years afterwards in 2002, the 8th district changes their precedence and takes in consideration California Cal.P.Code §17 and is reflected in numerous 8th District and 8th Circuit case.

Following are cases from the 8th District utilizing California's Cal.Penal Code §17 to validate prior California's State conviction for enhancement of sentence purposes. Movant has not been able to access these decision because they don't conform to rules for requesting certification to file a second or successive §2255 motion. Making §2255 Inadequate or Ineffective to test the merits of the claim. This situation has further prevented an Unobstructed Procedural Shot at redress. The following cases of authority from the 8th District and Circuit Courts, apply California's Cal.Penal Code §17 all support movant assertions, yet were decided after movants direct appeal in 1993, and after his §2255 in 1998.

*[2002] U.S. v. Gomez-Hernandez, 300 F.3d 974, 978 (8th Cir.2002) Under California law where [an] offence is alternately a felony or misdemeanor, it is regarded as a felony for every purpose "until judgment. (quoting Robinson 967 F. 2d at 287-293 (9th Cir. 1992). A "Wobbler" becomes a misdemeanor "after a judgment imposing a punishment other than imprisonment in the State Prison. "Cal P.Code §17(b) (1)

*[2004] U.S. v. Hinton, 100 fed Appx 595 (8th Cir. 2004)

*[2008] U.S. v. Vieczcas-Soto, 562 F.3d 903 (Oct. 14 2008 8th Cir.)

*[2011] U.S. v. Chahia, Lexis 50669 (U.S. 8th District Ct. March 3 2011)

*[2013] U.S. v. Adams, 716 F.3d 1066 (8th Cir. January 14 2013)

*[2015] U.S. v. Quebedo, 788 F.d 768 (8th Cir. Feb. 13 2015)

*[2016] U.S. v. Griffen, 670 Fed. Appx 431 (8th Cir. November 2016)

*[2017] U.S v. McPherson, Lexis 103940, (8th Dist.Ct. July 2017)

*[2018] U.S. v. Boswell, Lexis 126366 (8th Dist.Ct. July 2018)

*[2019] U.S. v. Konzen, Lexis 88511 (8th Dist.Ct. May 28 2019)